83-812

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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GEORGE C. WALLACE, in His Official Capacities as Governor of the State of Alabama and Ex Officio Member of the State Board of Education, *et al.*,
*Appellants*

v.

ISHMAEL JAFFREE, *et al.*,
*Appellees*

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**On Appeal from the United States Court of Appeals for the Eleventh Circuit**

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether a state statute which permits, but does not require, teachers in public schools to observe up to a minute of non-activity for meditation or silent prayer has the predominant effect of advancing students' liberty of religion and of mind rather than any effect of establishing a religion.

2. Whether a state statute which permits, but does not require, teachers in public schools to lead willing students in a prayer to God violates the Establishment Clause of the First Amendment to the Constitution.

## THE PARTIES

In the district court the plaintiffs in both cases, Civil Action No. 82-0554-H and No. 82-0792-H, which were consolidated on appeal, were: Ishmael Jaffree; Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, infants, by and through their best of friend and father, Ishmael Jaffree.

In Civil Action in which your appellant is named, No. 82-0792-H, the following were defendants: Fob James, in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; Charles Graddick, in his official capacity as Attorney General for the State of Alabama; John Tyson, Jr., Ron Creel, S.A. Cherry, Ralph Higginbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts, Jr., in their official capacities as members of the Alabama State Board of Education.

In the companion case in the district court, Civil Action No. 82-0554-H, consolidated with the instant case on appeal, the defendants were as follows: the Board of School Commissioners of Mobile County; Dan C. Aledander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth F. Drago, and Dr. Robert Gilliard, in their official capacities as members of the Board of School Commissioners of Mobile County; Dr. Abe L. Hammons, in his official capacity as Superintendent of the Board of Education of Mobile County; Annie Bell Phillips, individually and in her official capacity as principal of Morningside Elementary School; Julia Green, individually and in her official capacity as a teacher at Morningside Elementary School; Betty Lee, individually and in her official capacity as principal of E.R. Dickson Elementary School; Charlene Boyd, individually and in her official capacity as a teacher at E.R. Dickson Elementary School; Emma Reed, individually and in her official capacity as principal of Craighead Elementary School; Pixie Alexander, individually



and in her official capacity as a teacher at Craighead Elementary School.

In both civil actions, approximately six hundred individuals entered the case as Intervenors-Defendants. They have been designated in lower Court documents as "Douglas T. Smith, et al." The appellant will provide a complete list of these individuals if any member of this Court so desires.

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of a panel of the U.S. Court of Appeals for the Eleventh Circuit, dated May 12, 1983, is reported at 705 F.2d 1526 (1983) and set out in Appendix A. A dissenting opinion to the denial of a rehearing en banc in the Eleventh Circuit, dated August 15, 1983, is reported at 713 F.2d 614 (1983) and set out in Appendix B. The opinions of the district court in the two cases (later consolidated on appeal) dated January 14, 1983, are reported at 554 F. Supp. 1104 (1983) and 554 F. Supp. 1130 (1983) and are set out in Appendix D. An opinion by the district court, accompanying a preliminary injunction, dated August 9, 1982, is reported at 544 F. Supp. 727 (1982) and also set out in Appendix D. An opinion accompanying a stay order issued by Justice

Powell, acting as Circuit Judge, is reported at —— U.S. ——, 103 S.Ct. 843 (1983) and set out in Appendix E.

## JURISDICTION

This suit was brought under 42 U.S.C. § 1983 pursuant to 28 U.S.C. §§ 2201, 2202, 1343(3) and (4) to declare unconstitutional and enjoin the enforcement of two state statutes, Alabama Code § 16-1-20.1 (1982) and Alabama Code § 16-1-20.2 (formerly Alabama Act 82-735). The district court issued a preliminary injunction on August 9, 1982 (App. D-64). On January 14, 1983, the district court dissolved the injunction. (App. D-56 & 61). The U.S. Court of Appeals for the Eleventh Circuit declared both statutes unconstitutional and entered a judgment on May 12, 1983. (App. A and B). The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1254(2).

## STATUTES INVOLVED

Alabama Code § 16-1-20.1 (1982) and Alabama Code § 16-1-20.2 (former Alabama Act 82-735).

Section 16-1-20.1 states that:

> "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

Section 16-1-20.2 states that:

> "From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:



> 'Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.' "

## CONSTITUTIONAL PROVISIONS

AMENDMENT I (in pertinent part)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

AMENDMENT XIV (in pertinent part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Ishmael Jaffree, on behalf of three of his minor children, filed suit in the U.S. District Court on May 28, 1982, seeking declaratory and injunctive relief against his children's public school teachers who regularly led their students in vocal classroom prayer. The teachers' activity was not pursuant to any state statute or school policy. There was at the time an Alabama statute which provides teachers "may announce . . . a period of silence not to exceed one minute in duration . . . for meditation or voluntary prayer." Alabama Code § 16-1-20.1 (1982). The plaintiffs did not initially challenge this statute. After plaintiffs filed suit, the Alabama legislature passed another

statute, which provides teachers "may lead willing students in a prayer" which is set out in the statute. Alabama Code § 16-1-20.2 (former Alabama Act 82-735). In a second amended complaint adding the Governor of Alabama, the attorney general, and other state education authorities, Jaffree challenged the constitutionality of both statutes.

The district court severed Jaffree's complaint into two causes of action: one related to those teachers' activities unmotivated by the statutes, and the other related to the statutes. Following the severance, the court issued a preliminary injunction against the implementation of the Alabama school prayer statutes. *Jaffree By and Through Jaffree v. James*, 544 F.Supp. 727 (S.D. Ala., 1982) (App. D-64). After trial on the merits, the district court dismissed both actions, thereby dissolving the preliminary injunction. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D. Ala., 1983) (App. D-1). *Jaffree v. James*, 554 F.Supp. 1130 (SD. Ala., 1983) (App. D-56). Pending appeal, Jaffree filed an emergency motion for stay and injunction in the Eleventh Circuit Court of Appeals, which was denied (App. C). Jaffree requested Justice Powell, in his capacity as Eleventh Circuit Justice, to stay the trial court's order or reinstate the preliminary injunction previously issued by the district court. In a memorandum opinion, Justice Powell granted the stay and reinstated the injunction pending final disposition of the appeal in this case (App. E).

On appeal, the Eleventh Circuit Court of Appeals consolidated the two cases, reversed the district court's dismissal of the actions, declared both statutes and the teacher initiated prayer activity unconstitutional and directed the district court to enjoin both statutes and the teacher activity (App. A). A petition for rehearing was denied, with four judges dissenting from the denial (App. B). On October 14, 1983, the district court entered an



injunction against the statutes and the teacher activity (App. D-62).

## THE QUESTIONS ARE SUBSTANTIAL

This case would have merited a mere summary affirmance if the U.S. District Judge, Judge Brevard Hand, had not held a whole line of this Court's cases unconstitutional. That is not to say this Court should take notice of the temerity of a federal trial judge. Rather, the point is that the overwhelming evidence marshalled in this case, which compelled the trial judge to rule as he did, merits this Court's consideration.

That the trial court's ruling rests on reason, rather than rashness, is reflected in the actions of the trial judge. Initially, Judge Hand issued a preliminary injunction against both statutes. *Jaffree By and Through Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982) (App. D-64). In enjoining even the "meditation or voluntary prayer" statute, a matter on which neither this Court nor the Eleventh Circuit had ruled, the district judge assumed the plaintiff would prevail.[1] In the strongest language, he rejected any suggestion of deviating from this Court's precedents:

> "Finally, plaintiffs must establish the substantial likelihood that they will prevail on the merits. This Court adheres to the philosophy of *stare decisis* and has expressed itself in the past that the modern trend of handling matters on a case-by-case basis is destructive of the judicial system and precludes the citizens of this country from their right to know what the law is and how to follow consistent patterns of conduct in their day-to-day activities. The author of this opinion likewise took an oath before God that he would uphold the laws of the United States. Being consistent with this philosophy and to this oath, the Court is obligated to follow the decision law on this sensitive question. The clear im-

[1] The American Civil Liberties Union amicus brief on appeal praised this opinion, stating the "analysis was flawless." Brief at 8.

> port of these controlling decisions appears to the Court to be that the state should not involve itself in either prescribing or proscribing religious activity." 544 F.Supp. at 730-731. (footnote omitted) (App. D-69-70)

Only overwhelming evidence could have moved the district judge to reverse himself and to rule as he did.

The Eleventh Circuit's treatment of the district court's ruling has sent a signal that the district court's position is well-reasoned, rather than insurrectionary. Pending appeal, the Eleventh Circuit denied an emergency motion for a stay and injunction against the district court decision. Following Justice Powell's issuance of a stay pending appeal, —— U.S. ——, 103 S.Ct. 842 (1983), a panel of the Eleventh Circuit adhered to this Court's precedents and reversed, but did so without rebuking the district judge. Almost apologetically, the panel opinion emphasized at the beginning that it was "not called upon to determine whether prayer in public schools is desirable as a matter of policy." 705 F.2d at 1528 (App. A-2). In the course of its opinion, the Eleventh Circuit never said the district court's conclusions were incorrect; it emphasized only that this Court had decided otherwise. The appeals court concluded not with a ringing reaffirmation that the Constitution itself bars prayer in public schools, it affirmed only its impotence to change present "policy."

> "We do not decide today whether prayer in public schools is the proper policy to follow. This court merely applies the principles established by the Supreme Court. While many may disagree on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final arbiter of constitutional disputes." 705 F.2d at 1536. (App. A-20)

Four judges dissented from the denial of a petition for rehearing en banc. (App. B) Judge Roney, for Judges Tjoflat, Hill, Foy, and himself, contended the statute



authorizing "meditation or voluntary prayer" deserved en banc consideration because neither this Court nor any Court of Appeals has decided any case precisely on point. Judge Roney thought "there is some doubt as to the correctness of the panel opinion as to the one statute." (App. B-3) Thus, Judge Roney's opinion not only takes issue with the opinion of the panel, rather than that of the district court, but it corrects Justice Powell's conclusion that the entire case is controlled by clear precedent.

The collective response of the Court of Appeals is most remarkable in that faced with an unprecedented but a lengthy, well-reasoned ruling by a federal district judge, one which provoked wide public commentary and thereby reinforced populist resistance to this Court's school prayer decisions, not one of the seven judges on appeal who are on record reaffirmed the reasoning, nor even the principle, of the controlling precedents on school prayer. If this Court summarily affirms the reversal of the district court's ruling, the district court's reasoning will still stand unrebutted.

### I. The "Meditation or Voluntary Prayer" Statute

When viewed in its narrowest sense, this case presents a significant Establishment Clause issue not decided by this Court. As Judge Roney's dissent from the denial of a rehearing en banc points out, one of the two statutes, Alabama Code Section 16-1-20.1 (Supp. 1982), authorizes a teacher to observe a moment of silence for "meditation or voluntary prayer." The striking down of this statute merits this Court's full review for the same reasons Judge Roney and the other dissenters thought the case merited en banc consideration. These reasons are that (1) at least eighteen states have similar statutes; (2) only district courts (until this case) have ruled on the issue and they have split over the constitutionality of similar statutes; and (3) respected constitutional scholars consider the concept of silent prayer or meditation consistent with religious neutrality. *Jaffree v. Wal-*

*lace*, 713 F.2d 614, 615 (11th Cir., 1983) (Roney, J., dissenting) (App. B).

Even the meditation-or-voluntary-prayer statute, though, involves considerations larger than that of plugging a little lacuna in the jurisprudence. First, in determining the purpose of the statute under the three-part test employed on Establishment Clause claims, courts have differed over whether the effect of the statute or the motive of the sponsors should be given controlling weight. Second, the meditation or silent prayer statutes may push the three-part test past the limit of its logic and call for this Court to reconsider the criteria for evaluating issues under the Religion Clauses.

**(a) *The Three-Part Test: Purposes and Effects***

The appellate opinion devoted only one paragraph to discussing the purpose and effect of the meditation-or-voluntary-prayer statute. The panel held the statute constituted an "advancement of religion" because it was established that "the intent of the statute was to return prayer to the public schools," and because it mentioned the word "prayer". 705 F.2d at 1535 (App. A-18) The Court failed to address the effect of the statute other than to observe "[a]dditionally, the statute has the primary effect of advancing religion." 705 F.2d at 1535 (App. A-18)

Judge Roney's approach was very different and, we submit, more in keeping with this Court's application of the criteria for judging Establishment Clause claims. Judge Roney and the other dissenters thought the motives of the sponsoring legislator "should not be used to invalidate a neutral statute which is both facially and operationally constitutional." 713 F.2d 614, 616 (1983) (App. B-4). Judge Roney relied on a three-judge court which had upheld a similar statute, *Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass., 1976), and which had focused on the effect of the statute.



The three-part test applicable to Establishment Clause claims requires that governmental action (1) "must have a secular legislative purpose"; (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) "must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). While a statute must satisfy each prong of the three-part test, the "effect" prong has consistently proven to be dominant. Any given statute is likely to have more than one purpose, at least one of which may be secular; however, the statute can be deemed to have only one "primary effect". Only two of this Court's cases focus on the finding of purpose, *Stone v. Graham*, 449 U.S. 39 (1980) (holding unconstitutional a state statute requiring the posting of the Ten Commandmants in public school classrooms despite the statement of a secular purpose), and *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding unconstitutional a state statute prohibiting the teaching of evolution). In each case the predominant effect on the statute bespoke its purpose. Where the statute has no such predominant effect, as with certain forms of aid to Church schools, this Court has had no difficulty in finding a secular purpose, despite the obvious religious motivation of the legislation's sponsors. See e.g., *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062 (1983).

Those courts which have ruled the meditation or silent prayer statutes unconstitutional, on the other hand, have done so if *any* of its purposes can be said to be religious. Thus, in *Duffy v. Las Cruces Public Schools*, 557 F.Supp. 1013 (D. N.M. 1983), a district court declared a similar statute unconstitutional simply because the statute contained the word "prayer." 557 F.Supp. at 1019. In *Beck v. McElrath*, 548 F.Supp. 1161 (M.D. Tenn. 1982), cited by the Eleventh Circuit in this case, the district court acknowledged that "[i]t may well be, as defendants contend, that a moment of silence in and of itself is non-discrimnatory and may serve a secular

purpose in aid of the educative function," but the Court nevertheless found a religious purpose based on the statements of the bill's supporters. 548 F.Supp. at 1163.

Searching for any religious purpose rather than accepting a clearly visible secular purpose not only distorts the three-part test, but demonstrates hostility to religion. While this Court has applied a "strict scrutiny" test to the Establishment Clause, *Larson v. Valente*, 456 U.S. 228 (1982), it has done so in the context of a state statute that imposed onerous legal obligations on some religions but not on others, a situation not applicable in this case. More generally, this Court has been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the fact of the statute." *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3066 (1983). To say a statute is unconstitutional *if it does not have a secular purpose* is significantly different from saying it is unconstitutional *if it has any religious purpose* because the latter approach creates the impression that a religious purpose is an unconstitutional purpose. A search for religious purpose subtly shifts towards a process of rooting out religious purpose.

A practice of proving religious purpose by strictly scrutinizing motives leads to consequences that are not all that speculative. Attacks have already been made on Congressional legislation and Presidential actions in terms that attempt to equate a finding of religious motive with an unconstitutional purpose. Constitutional challenges to the "Year of the Bible" declared by the President are pending in *Zwerling v. Reagan*, No. CV-83-2504-R (C.D. Cal.) and *Gaylor v. Reagan*, No. 82-C-985-D (W.D. Wis.), *prel. inj. den.*, 553 F.Supp. 356 (W.D. Wis. 1982). Presumably a religious motive, along with other possible motives, is present. Previously the American Civil Liberties Union has argued that the Hyde Amendment, which restricts funding for abortions, violates the Establishment Clause, *inter alia*, because the sponsors were religiously



motivated. In *McRae v. Califano*, the district court rejected the alleged lack of a secular purpose even while recognizing the religious sponsorship of the legislation. 491 F.Supp. 630, 741 (E.D. NY, 1980). This Court also rejected the Establshment Clause claim in that case without inquiring into the motive or purpose but by focusing only on the effect. *Harris v. McRae*, 448 U.S. 297 (1980). As the district court in *McRae* recognized, the consequence of equating a finding of the sponsors' religious motivation with a violation of the Establishment Clause would be to preclude religious leaders from participation in the political process because they would fear their support for a bill would guarantee a declaration of unconstitutionality. 491 F.Supp. at 741.

**(b) *Establishment or Free Exercise Issue***

As Professor Paul Freund recently observed, the critical test for this Court in the area of school prayer "may come when it reaches the case of a law specifying a moment of silent meditation."[2] Such statutes, as is the one in this case, cause a collision between the logic of the Establishment Clause criteria and that developed in the Free Exercise cases. The outcome is likely to turn not on the criteria of the cases, but upon this Court's conceptualization of the issue. As Professor Freund says:

> "If the Court were to regard the crucial issue as one of establishment, forbidding prayer of any kind on the public premises, it might be tempted to rule that unconstitutional. But if one thinks of it as a free-exercise problem turning on psychological coercion, a silent prayer not in unison, accompanied by other forms of private meditation would not offend the Constitution."[3]

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[2] P. Freund, "Storms over the Supreme Court", 69 A.B.A.J. 1474, 1480 (Oct., 1983).

[3] *Id.*

Viewed as presenting a Free Exercise issue, the meditation-or-silent-prayer statutes accommodate the exercise of personal liberties of religion and mind while avoiding a predominant effect which is religious. The legislature's act of guaranteeing the opportunity to exercise one's personal liberties involves a secular purpose even if those sponsoring and lobbying the legislation are religiously motivated. If those lobbying for such legislation had instead filed suit and obtained some redress from a court under the Free Exercise Clause, the court's actions would not be considered religious in nature. This Court has required states in their laws and regulations to respect the religious rights of citizens under the Free Exercise Clause. See *Sherbret v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board*, 450 U.S. 707 (1981). The fact that the political process generally, although certainly not always, does so is not evidence of an establishment of religion.

Viewing the statute simply in terms of the Establishment Clause, the appellate court too easily extended the controlling criteria to a result exceeding the limit of their logic, thereby eroding the free-exercise guarantee and appearing to foster hostility toward religion. Certainly, the writer of the appellate opinion, Judge Hatchett, exhibited no hostility toward religion in his opinion; if anything, he showed considerable tolerance because he was among the judges who declined to issue a stay of Judge Hand's decision which was later stayed by Justice Powell. Nevertheless, both Judge Hatchett and Judge Hand at different points unnecessarily extended the logic of this Court's school prayer opinions in conscientiously attempting to apply them to the meditation-or-voluntary prayer statute. Judge Hatchett, on appeal, and Judge Hand, on preliminary injunction (App. D-71), found a violation of the Establishment Clause in the fact of a religiously-motivated legislator's sponsorship of a statute which is facially neutral regarding religion. They both



found this to be the irresistible consequence of the logic of prior cases.

It is the dry logic of the three-part test pushed past the appropriate parameters which is becoming hostile to religion. This Court has recently realized that some situations are ill-suited for analysis under the three-part test. Thus the Court has upheld a legislature's employment of a state-paid chaplain against a claim under the Establishment Clause without ever mentioning the three-part test. *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330 (1983). This term, in *Lynch v. Donnelly*, —— U.S. —— (No. 82-1256; October Term, 1982), the Justice Department has urged "that the three-part test (just like the strict scrutiny test) results in analytic overkill when applied" to a city's display of a nativity scene as part of a Christmas display.[4] Although both cases are factually distinguishable from the instant case, the issues of all three strain the current three-part criteria for judging Establishment Clause claims.

The tension that is said to exist between the two religion clauses is no doubt due in part to the fact that this Court has analyzed them separately and applied different tests depending on whether the issue is framed as an establishment or a free-exercise question. As groups such as the American Civil Liberties Union generate more Establishment cases than there are free-exercise claims being decided, the cases tend to develop and expand the Establishment Clause at the expense of the Free Exercise Clause which remains relatively dormant.

That the cases decided have altered the balance and our conceptualization of the issue can be clearly demonstrated with respect to the issues of meditation and voluntary prayer, particularly in the Fifth and Eleventh Circuits.[5] The Fifth Circuit held unconstitutional a school

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[4] Brief of the United States at 24.

[5] Although split from the Fifth Circuit, the Eleventh Circuit applies previous Fifth Circuit precedent as its own.

policy which permitted voluntary prayer after school in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir., 1982), *cert. denied*, —— U.S. —— (1983), and held a voluntary prayer statute unconstitutional in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir., 1981), *aff'd*, 455 U.S. 913 (1982). In both of these recent cases there were provisions for silent meditation,[6] but in neither case did the plaintiffs challenge that aspect of the prayer policy. Indeed, in the *Lubbock* case, the L.C.L.U. had been told in 1971 that the practice of "open prayer" would not be stopped, 669 F.2d at 1039, and n. 2, but the L.C.L.U. apparently did not consider the practice of voluntary prayer challengeable at the time. In 1979 when it did challenge the "open prayer" policy, the L.C.L.U. did not pursue a challenge to the meditation or prayer policy in the course of the *Lubbock* case.[7] The A.C.L.U., however, recently argued on appeal in this case that the meditation-or-voluntary prayer statute was indistinguishable under *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963), and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), from the other Alabama prayer statute.[8] Likewise, the Eleventh Circuit struck down the meditation-or-voluntary prayer statute as if it were clearly indistinguishable from the statute struck down in *Schempp*, *supra*, and *Engel*, *supra*. The fact that the appellate court decision conflicts with the dictum of Justice Brennan in *Schempp*, 374 U.S. 203, 281 and n. 57 (1963) (Brennan, J., concurring), to the effect that a moment of silence might be constitutional shows not only how far this decision is from the problem in the landmark school prayer cases, but also that the balance between the Religion Clauses is too heavily weighted towards the Establishment Clause.

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[6] See 653 F.2d at 899; 669 F.2d at 1039, n.2.

[7] See 669 F.2d 1038 at 1041-42 and n.7.

[8] A.C.L.U. Brief at 8-9.



The meditation-or-silent prayer statutes offer this Court the opportunity to achieve a necessary course correction to avoid collision with or erosion of the Free Exercise Clause. At a minimum, the Court could modify the current three-part test as suggested in our statement of the issue and discussion. The altered criteria would focus on the "predominant" effect of the statute to determine whether there has been any violation of the Establishment Clause. More fundamentally, the Court could actually treat the two Religion Clauses together in a way that would establish complementary, rather than conflicting, criteria. As Justice Rehnquist noted in *Thomas v. Review Board*, 450 U.S. 707 (1981):

> "The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the 'tension' between the two Clauses, *it does little to help resolve that tension or to offer meaningful guidance to other courts which must decide cases like this on a day-by-day basis. Instead, it simply asserts that there is no Establishment Clause violation here and leaves the tension between the two Religion Clauses to be resolved on a case-by-case basis.* As suggested above, however, I believe that the 'tension' is largely of this Court's own making, and would diminish almost to the vanishing point *if the Clauses were properly interpreted.*" 450 U.S. at 722 (Rehnquist, J. dissenting) (emphasis added)

## II. The School Prayer Statute

> "Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal sentiment in America was that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of con-

science, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation." 3 J. Story, *Commentaries on the Constitution of the United States*, § 1874.

Supreme Court Justice Joseph Story's discussion[9] in 1833 of the purpose of the Religion Clauses in his, the most authoritative, treatise of its time on constitutional law contradicts the foundation upon which rests every Establishment Clause case since *Everson v. Board of Education*, 330 U.S. 1 (1947). In other words, the "wall of separation" metaphor fails to reflect the "general, if not universal sentiment in America" at the time the Amendment was adopted. Moreover, it is perfectly consistent with the intent of the Framers and in the best American tradition to "disapprove" and "become indignant" toward cases which "attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference."

Opening the basic meaning of the Religion Clauses for reconsideration especially on the issue of school prayer, as done by the district court, initially seems unthinkable. The reasons are easily stated. (1) The historical evidence concerning the intent of Religion Clauses is well known. (2) Story's statements are simply the views of one commentator. (3) It is not possible to determine clearly what was the Framers' intent regarding the Religion Clauses. (4) Having previously reviewed the historical evidence, this Court has definitely determined the intent of the Framers. (5) Whatever the intent of the Framers, the enactment of the Fourteenth Amendment, as applied by this Court to the states, has altered the intent of the Framers. (6) Any fundamental change in the case law would threaten religious freedom and other fundamental

[9] §§ 1870-1879, 3 J. Story, *Commentaries on the Constitution of the United States* (3rd ed. 1858).



rights. (7) The existence of public schools, which were unknown to and unanticipated by the Framers, requires the adaptation of the principles underlying the Religion Clauses to modern circumstances. (8) The modern consensus concerning the relationship of church and state makes a return to the intent of the Framers impossible. (9) Even if it were possible to return to the intent of the Framers, this Court is not prepared to do so.

This list of objections includes many more points than were mentioned in the Eleventh Circuit opinion but which are relevant considerations for this Court. For purposes of discussion, the nine objections are grouped into threes under the following three headings: (a) The Argument from History; (b) The Argument from the Case Law; and (c) The Argument from Policy.

### (a) *The Argument from History*

The district court opinion concluded "after reviewing the historical record . . . that the founding fathers of this country and the framers of what became the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal government and religion." 554 F.Supp. at 1117-18 (App. D-27). To support this conclusion, the opinion reviewed the historical evidence in detail, some but not all of which is known. The great detail of the opinion, however, has somewhat camouflaged the most significant piece of evidence which is missing from previous opinions, the writings of Justice Joseph Story.

Justice Story's statements are not merely the views of one among many commentators. First, his statements, which are made much closer to the adoption of the Amendment, not only explain the Religion Clause, but also record what was unequivocally the understanding of the Framers. Second, it is significant that he was appointed by President Madison, whose views have been considered so important on the Religion Clauses; that he sat on the Supreme Court for thirty-four years and during twenty-

four years of the tenure of Chief Justice Marshall with whom he closely collaborated; that as a teacher at Harvard Law School and a writer of many treatises, his treatise on Constitutional Law was for several generations of lawyers *the* statement of "the Law." Especially at a time when court opinions were considered only evidence of the law, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and treatises carried great weight, Justice Story's statements provide clearly the best evidence available on the intent of the Framers and the state of the law.

The assumption regarding the Religion Clauses has been that, while history is important, it is impossible to know exactly what the Framers meant. Certainly, this is an understandable assumption given the attempt to reconstruct the intent of the Framers based only on the materials before this Court in 1947 in *Everson v. Board of Education*, *supra*. In *Everson* there is absolutely no reference in the briefs of counsel [10] or in the opinion of this Court to Justice Story's statement of the Framers' intent as it had been well understood.

A reading of Story's discussion of the Religion Clauses shows how "clearly erroneous" have been the findings of historical fact by this Court. Certainly, the errors have been made in good faith and on an inadequate record. While it may be that this Court will continue to adhere to its views of the Religion Clauses based simply on the existing precedents and for reasons of policy discussed below, it will nevertheless greatly assist the analysis of all future Religion Clause cases to correct officially the historical record.

**(b) *The Argument from the Case Law***

To contend that this Court has fully canvassed the history and that, therefore, this Court—as opposed to the

[10] See Kurland and Casper (ed.), 44 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 687 et. seq. (1975).



district court—should not reconsider the issue is not only inconsistent with intellectual candor but with what this Court recently did in *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330 (1983). In only one modern case prior to *Marsh v. Chambers*, namely, *McGowan v. Maryland*, 366 U.S. 420 (1961), has any member of this Court made any reference at all to Justice Story's statements and then by identifying them as the views of an "early commentator." 366 U.S. at 441. In *Marsh*, however, Justice Brennan's dissent referred to Story's writings on the subject, implying that actually to follow the original intent of the Framers would be to give a "static and lifeless meaning to their work." —— U.S. ——, 103 S.Ct. at 3349 (Brennan, J., dissenting). *Marsh*, of course, relied not at all on the current Establishment Clause criteria, but instead on the historical record which was more fully developed in *Marsh* than in previous cases with assistance from the amicus brief of the United States. Much of this material also appeared in district court opinion in this case.

That this Court should only now become fully aware of important historical evidence is easily explainable. Although the named plaintiffs in the various cases have differed, the common denominator in the religion cases has been the involvement of the American Civil Liberties Union and organizations with similar views. On the opposing side, there has been no coordinated and on-going strategy or research among the various defendants. From the briefs, it is clear that the parties defending against Establishment Clause claims have failed to develop adequately the background of the Religion Clauses in response to assertions made by the A.C.L.U.[11] While any group is entitled to work for a particular agenda, this Court is not bound to equate that group's personal views with the meaning of the Religion Clauses once it becomes

[11] See the briefs in *Cantwell v. Connecticut*, 310 U.S. 296 (1940); 37 *Landmark Briefs*, *supra*, at 205 et. seq.: and *Everson v. Board of Education*, *supra*, in 44 *Landmark Briefs*, *supra*.

clear those views are directly opposed to the Framers of the Religion Clauses.

The predictable response is that, regardless of the Framers' intent, the later enactment of the Fourteenth Amendment has changed matters. It will be said that this Court has fully considered the intent of the Framers of the Fourteenth Amendment during the course of the "incorporation" debate between Justices Black and Frankfurter [12] and has decided in effect with few exceptions that the provisions of the Bill of Rights are applicable to the states. This response, however, does not dispose of the case because the district court's decision is supportable *even in the absence of any holding regarding the Fourteenth Amendment.*

The district court holding that the Constitution does not preclude prayer in public schools rested both on its conclusion that the Establishment Clause does not create a "wall of separation" and that the Establishment Clause does not apply to the states. But even without unincorporating the Establishment Clause which has been held applicable to the states, *Everson v. Board of Education*, 330 U.S. 1 (1947), the school prayer cases would be decided differently if the original understanding of the Establishment Clause was restored. It is more the misinterpretation of the Establishment Clause than its application to the states which is currently creating issues in cases such as *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330 (state-paid legislative chaplains) and *Lynch v. Donnelly* (No. 82-1256, October Term, 1982) (state display of a nativity scene).

Although the appellant wishes to emphasize the overriding importance of the Establishment Clause issue, it also urges the district court's conclusion that the Framers of the Fourteenth Amendment did not intend to

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[12] See *Adamson v. California*, 332 U.S. 46 (1946) (Frankfurter, J., concurring at 59) (Black, J., dissenting at 68).



incorporate the Establishment Clause. As long as the Establishment Clause was not applicable to the states its meaning presented few practical problems. We agree with the district court that the Framers of the Fourteenth Amendment did not intend to incorporate any of the Bill of Rights, although we do acknowledge that this Court has considered the question generally in the course of the debates between Justices Black and Frankfurter. The evidence regarding the intent of the Framers of the Fourteenth Amendment, however, is reviewed more fully in the district court opinion than in any majority opinion of this Court. Moreover, the specific issue of the incorporating the Establishment Clause is significantly distinguishable from the other provisions of the Bill of Rights that a proper understanding of the Establishment Clause, we contend, offers additional reasons for not applying it to the states.

The issue of incorporating the Establishment Clause has been most fully addressed in a concurring opinion by Justice Brennan in *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963), long after it had already been casually incorporated. The incorporation of the Establishment Clause in *Everson v. Board of Education, supra*, based on the dicta in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), occurred prior to the great incorporation debate. Its application to the states did not become controversial until the school prayer cases when it became apparent that this Court's understanding of the Religion Clauses differed significantly from the religious guarantees of the states.

In *Schempp*, Justice Brennan's concurring opinion considered and rejected several arguments distinguishing the incorporation of the Establishment Clause from other provisions of the Bill of Rights: the fact that the Establishment Clause is worded as a prohibition against Congress rather than as a right, and the unsuccessful attempt in 1876 during the 39th Congress to pass the Blaine Amendment prohibiting a state establishment of

religion.[13] See 374 U.S. at 254-258 (Brennan, J., concurring). Justice Brennan's rejection of the significance of the Blaine Amendment is influenced by what we have respectfully pointed to as a mistaken understanding of the Religion Clauses. Nevertheless, Justice Brennan's reasons for rejecting these distinctions actually provide further reasons for reversing the school prayer cases.

Justice Brennan concluded that the application of the Establishment Clause to the states was not the problem it once might have been because long before the Fourteenth Amendment all states had eliminated established churches. Therefore, absent that obstacle, the incorporation of the Free Exercise Clause required also the incorporation of the Establishment Clause because the two clauses are complementary. 374 U.S. at 255-256. While the two clauses are complementary, the application of the two to the states in the context of school prayer not only turns the intent of the Framers of the Religion Clauses upside down, but it conflicts also with the further points made by Justice Brennan.

The Religion Clauses are unlike most other aspects of the Bill of Rights, which were designed to apply the

[13] Title 4 Cong. Rec. 5580 (1876) states in pertinent part, that: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification for any office of public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States, or any State . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect . . . wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supporting in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect . . . to promote its interest or tenets. *This article shall not be construed to prohibit the reading of the Bible in any school or institution.* . . . As cited in *Jaffree v. Wallace*, 705 F.2d at 1531 App. A-9A. (emphasis added)



common-law, procedural rights already recognized by the states to the federal government in criminal actions against state citizens. When this Court "incorporated" these rights through the Fourteenth Amendment, they were already applicable, at least in theory, in various states. The controversial aspect of incorporating these rights was not the rights themselves but their interpretation and enforcement by federal courts. See e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937). The matter of the Religion Clauses was different. At the time of adopting the Bill of Rights, many states *did not guarantee freedom of religion* and did have established churches. The states were saying two different things to the federal government: regarding common-law procedural rights, do as we do; regarding the Religion Clauses, *do not* do as we do.[14]

Justice Brennan's point is that the original intent does not matter after passage of the Fourteenth Amendment. First, Justice Brennan's answer to the objection that the attempt to pass the Blaine Amendment shows that the Congress in 1876 did not think the Fourteenth Amendment had incorporated the Establishment Clause is to note only that the Blaine Amendment would have provided greater protections than those already provided by the Religion Clauses. 374 U.S. at 257. Such an inference regarding the proposed amendment with its *greater pro-*

[14] What appears today to be an apparently inconsistent approach to "rights" is perfectly consistent with the political views of the anti-Federalists who opposed the Federalist attempt to develop the nation as a large commercial republic and who also insisted on a Bill of Rights. The anti-Federalists favored small republics, and "urged that the new rulers should turn their attention to the *task, which surpasses the framing of constitutions, of fostering religion and morals, thereby making government less necessary* by rendering 'the people more capable of being a Law to themselves.' Such self-government was possible, however, only if the center of gravity of American government remained in the states." Storing, *What the Anti-Federalists Were For* (1981) at 23 (footnote omitted; emphasis added).

*tections*, however, only makes more significant the fact that it specifically exempted Bible reading in "any school." [15]

Second, Justice Brennan misses the significance of the fact that the American people disestablished their state churches before even arguably the Fourteenth Amendment required them to do so. This development is a tribute not only to the good sense of the American people, but also to the genius of the Framers of the body of the Constitution. This ever-increasing religious tolerance of Americans, before federal courts intervened, does much to answer the objection that if the courts could not enforce the Establishment Clause that the states would reestablish religion.

The voluntary dis-establishment of churches and increasing religious toleration would have come as no surprise to Alexander Hamilton and especially James Madison, two of the three authors of *The Federalist Papers*, so much cited in Justice Story's *Commentaries on the Constitution*. To begin with, Hamilton, the champion of judicial review, see *The Federalist* No. 78, thought a bill of rights unnecessary because the body of the Constitution is itself a bill of rights, *The Federalist* No. 84. Besides the specific guarantees within the body of the Constitution, e.g., the right to jury trial, the structure of the Constitution in terms of commerce was a key to the *Federalist* reading of the Constitution. As construed by the Marshall court, which followed the teachings of *The Federalist Papers*, the Commerce Clause has effectively worked to weld a group of disparite peoples into one, bringing people to overcome the prejudices of religion by engaging in economic exchange. Cf. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

In all the discussions of Madison's understanding of the Religion Clauses, relatively little attention has been paid to his writing in *The Federalist Papers*. While

[15] See n.13.



*Larson v. Valente*, *supra*, refers to Madison's discussion in *Federalist* No. 51 of "multiplicity of interests" as a protection for religious rights, 456 U.S. at 245, that discussion is tied to Madison's discussion in *Federalist* No. 10, concerning the danger of "factions". Madison defined "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Federalist* No. 10 at 54 (Mod.Lib.ed.) His definition clearly includes zealous religious groups. Nevertheless, his approach when dealing with the Constitution differs from his support of the Declaration of Rights for his own state of Virginia. His solution to the dangers posed by factions as a national, and therefore constitutional problem, was to eliminate the "*effects*", rather than the "*causes*" [16] by multiplying factions dispersed throughout a large commercial republic, as opposed to the anti-Federalist (Jeffersonian) advocacy of small "virtuous religiously dominated republics".[17] Madison summarizes the solution, which involves something more than just "pluralism" or a "multiplicity of interests", as follows:

> "The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. *A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. . . .*
>
> "In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in

[16] See discussion of "purposes and effects" *infra* at 8-11.

[17] See n.14.

cherishing the spirit and supporting the character of Federalists." *Federalist* No. 10 at 61-62 (Mod. Lib.ed.) (emphasis added)

**(c) *The Arguments from Policy***

The dangers of religious factionalism described by Madison and basically solved through the workings of our constitutional republic are once again very much present. Today, the flame of religious zeal is everywhere in evidence in matters that are also political. But this activity is not, as intended by the Constitution as understood by Madison, confined to particular parts of the republic. The availability of electronic technology has undoubtedly facilitated the formation of national religious factions, but much of the motivation for doing so is surely a result of the nationalization of the Religious Clauses.

It is not disrespectful to observe the obvious: this Court's school prayer decisions have fanned the flames of religious factionalism. They have united various denominations in a common cause to restore school prayer through a constitutional amendment or otherwise. Whether they will succeed is less significant than the fact they are trying. What concerned Madison was not whether a faction constituted a majority or minority, but whether it was able to become a national movement. See *Federalist* No. 10.

The fact that the Founders foresaw the dangers of national factions to a free government is far more important than whether they foresaw the public school system in America (although there is evidence of their awareness of such a possibility [18]). The way to guarantee that the

[18] One Anti-Federalist writer ". . . hoped that the first Congress under the Constitution would recommend to the states the institution of such means of education 'as shall be *adequate* to the *divine, patriotick purpose* of training up the children and youth at large, in that solid learning, and in those pious and moral principles, which are the *support*, the *life* and SOUL of republican government and liberty, of which a free Constitution is the body.'" Storing, *supra*, n.14, at 23. (emphasis in the original).



Constitution will last for the ages is not by wandering from the wisdom of the Founders on issues of religion. Although well-intentioned, such departures have spawned the very religious divisiveness, see *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), this Court has sought to dissipate. Parents concerned that their children will spend most of the time during their formative years in public schools from which any acknowledgment of God is barred have taken their case to Congress and the President. If either the Establishment Clause did not apply to the states or the Religion Clauses were construed according to the intent of the Framers, those with different beliefs would have to work out a *modus vivendi* at the local level as the Founders intended.

If there were no doubt the Constitution required the result in the school prayer cases, this Court would have to adhere to them despite popular opposition. When they are now shown not to rest on the intent of the Framers, they must be sustained, if at all, simply by the force of their holdings or on other policy grounds. If the intent of the Framers is not to be followed because that would be "static and lifeless", *Marsh v. Chambers*, *supra*, 103 S.Ct. at 3349 (Brennan, J., dissenting), some attempt should be made to explain why the existing precedents have not been completely undermined.

It may be said that a reversal of the school prayer decisions is unthinkable in light of a public consensus which has come to accept the metaphor of a "wall of separation" between church and state, especially as applied to public schools. If such a consensus does exist, however, that fact is not an argument against a reversal of *Engel*, *supra*, and *Schempp*, *supra*; rather, that fact provides reasons to believe a reversal of the school prayer decisions would not have drastic consequences. Any religious minority which would attempt to establish any program would have to contend with that consensus—but at the local rather than the national level. For minorities oppressed by a religious majority, other provisions of the Constitution would re-

main available. If the Religion Clauses were reinterpreted to conform to the Framers' intent, but were not "unincorporated", they would still remain applicable to the states to correct individual injustices on a case-by-case basis. Even if one or both of the Religion Clauses were "unincorporated", the due process clause of the Fourteenth Amendment would nevertheless be available to protect persecuted religious minorities. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The present case offers this Court a number of strategies for modifying its increasingly untenable position on the Establishment Clause. From the narrow issue of the meditation-or-voluntary prayer statute to unincorporating the Establishment Clause to reinterpreting the Religion Clauses, the Court has in this case a situation unlikely to occur again where these issues have been fully considered by the district court. As indicated in *Illinois v. Gates*, —— U.S. ——, 103 S.Ct. 2317 (1983), it is unclear how a party can or should seek to have a fundamental issue reconsidered once this Court has spoken definitively.[19] If this Court must ask for an issue to be argued, which practice seems inconsistent with the notion of the case or controversy requirement, it means the record is likely to be inadequate. Ironically, the more far removed an argument regarding the Establishment Clause is from the intent of the Framers, the better the chance of having the argument seriously considered in the courts because there is less likelihood that a case has yet to reject the argument.

The time is ripe for other reasons as well to reconsider these fundamental issues. At the time the school

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[19] "The Court observes that 'although the Illinois courts applied the federal exclusionary rule, there was never "any real contest" upon the point' . . . But the proper forum for a 'real contest' on the continued vitality of the exclusionary rule that has developed from our decisions . . . is this Court." —— U.S. ——, 103 S. Ct. at 2338 n.6 (White, J., concurring).



prayer decisions were rendered this Court could have had a reasonable basis for believing that its general understanding of the Establishment Clause was correct given the fundamental unanimity on this issue in *Everson v. Board of Education*, *supra*. This Court could have been reasonably confident that the controversy stirred by the school prayer cases was due only to the recent application of well-established principles to a situation peculiarly a state concern, the public schools. This explanation no longer suffices. As *Marsh v. Chambers*, *supra*, and *Lynch v. Donnelly*, *supra*, exemplify, current cases that ostensibly involve state issues apply equally well to instances in which the national government has acknowledged God's existence. As Justice Brennan indicated in *Marsh*, the consequences of deciding other than the Court did in that case must have been a serious consideration. —— U.S. ——, 103 S.Ct. at 3351 (Brennan, J., dissenting).

In the final analysis reconsideration of the school prayer decisions may be unthinkable simply because this Court is content not to rethink them. To return to the intent of the Framers may seem misguided "because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers." —— U.S. ——, 103 S.Ct. at 3348 (Brennan, J., dissenting). This response only confirms and completes Judge Hand's desecretion of the myth that the results in *Engel*, *supra*, and *Schempp*, *supra*, were preordained by the Constitution. Unless this Court's school prayer pronouncements have become an article of faith, they require some reasonable grounds be substituted to support their results.

A proper respect for this Court prompts us to remonstrate with each Justice to judge the issues in this case as ripe for a full review, having in mind the words of Alexander Hamilton in defense of a separate judicial branch of government. Hamilton's remarks are the only answer to the arguments of the anti-Federalists or others

who cite(d) the power of the Federal Judiciary to excite populist fears to defeat (change) the Constitution.

> The judiciary ". . . may truly be said to have neither FORCE nor WILL but merely judgment. . ."
>
> *The Federalist Papers* No. 78 at 504 (Mod.Lib.ed.) (emphasis in the original)

## CONCLUSION

We submit that the Court of Appeals for the Eleventh Circuit incorrectly reversed the judgment of the district court and erroneously enjoined the two state statutes. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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